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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. [redacted] 170

PREFERRED INSURANCE COMPANY, Grand Rapids, Michigan, a Michigan corporation (in Liquidation, RUSSELL E. VAN HOOSER, Insurance Commissioner of the State of Michigan and Domiciliary Receiver),

Petitioner,

vs.

JAMES L. BENTLEY, Insurance Commissioner of Georgia, and STATE BOARD OF WORKMEN'S COMPENSATION,

Respondents.

PETITIONER'S REPLY BRIEF

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IN THE

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No. 1454

PREFERRED INSURANCE COMPANY, Grand Rapids, Michigan, a Michigan corporation (in Liquidation, RUSSELL E. VAN HOOSER, Insurance Commissioner of the State of Michigan and Domiciliary Receiver),

Petitioner,

vs.

JAMES E. BENTLEY, Insurance Commissioner of Georgia, and STATE BOARD OF WORKMEN'S COMPENSATION,

Respondents.

PETITIONER'S REPLY BRIEF

The Respondents, Insurance Commissioner of Georgia and State Board of Workmen's Compensation, have not responded to the Petition herein. The only response made is by two claimants, Willie Ruth Simmons and H. B. Simmons.

Conceeding that the jurisdiction of this Court for a Writ of Certiorari has been properly invoked under 28 U.S.C. Sec. 1257(3), (inadvertently stated as 28 U.S.C. 1251(1) in the petition), they contend that petitioner is estopped from requesting a review of the final judgment of the Supreme Court of Georgia made February 20, 1969 (App. A, pp. 1a-5a) because he did not petition for the writ from the judgment of that court made October 20, 1967 (App. B, p. 6a), and that none of the constitutional questions were properly raised prior to the submission of the petition herein. These and other contentions are discussed below.

1.

As To The Judgment Of October 20, 1967

The judgment of the Georgia Supreme Court of October 20, 1967 could not have been reviewed because it was not a "final judgment or decree" (28 U.S.C. Sec. 1257).

In the proceedings which *followed* that judgment, as delineated in the judgment which is the subject of the petition (App. A, p. 1a), the Ancillary Receiver set forth and described the claims filed for various types of loss and his recommendations as to their allowance or disallowance, etc. (App. J, pp. 23a-25a), and the trial court thereafter held a hearing thereon to determine them, and directed the filing of a further and final report, etc. (App. K, pp. 26a-27a).

Thus it is clear that no claims were passed upon prior to the making of the judgment of October 20, 1967 and it did "not finally and completely dispose of the subject matter of the litigation either as to the parties or the cause involved". It was not a judgment which could have

been presented to this Court for review. (*Arnold* v. *United States, etc.*, 263 U.S. 427, 432-433, 434.) To the same effect *Georgia R. & Power Co.* v. *Decatur*, 262 U.S. 432, 436-437. It was not the final word of a final court (*Market St. Ry. Co.* v. *Railroad Commission of State of Calif.*, 324 U.S. 548, 551).

2.

As To The Constitutional Questions

Claimants' contention that the constitutional questions were not properly raised in the state court is akin to an ostrich burying his head in the sand. The raising of such constitutional questions is clearly set forth in petitioner's main brief and the appendix with chapter and verse. They were essentially involved and necessarily passed upon in the state court. This Court would have jurisdiction even if they had not been expressly asserted, or were inartistically phrased (*Tilt* v. *Kelsey*, 207 U.S. 43, 51, *Manhattan Life Insurance Co.* v. *Cohen*, 234 U.S. 123, 134).

3.

As To The Force Of The Judicial Admission

The claimants for the first time seek to evade the force and effect of the judicial admission by the respondents as to the Uniform Insurers Liquidation Act of Georgia and Michigan, by saying they were not required to answer it. Of course they were not. Nor were they required to answer any of the other allegations of the pleading of the plaintiffs (respondents), their Commissioner of Insurance and State Board of Workmen's Compensation (App. C., pp. 7a-9a). But it was the basis of their intervention in the state court and the filing of their claims and presence here. If they wanted to take issue with it, they could have raised it in their pleading. They did not.

All they were interested in was the pressing of their claims. They were glad to take the proceeding as it was which gave them that opportunity.

None of the cases cited by them is relevant; and the Georgia statue which they neither quote nor set forth in an appendix, is wholly inapposite.

The use of such a spurious plea to defeat justice and deprive creditors of the defunct company outside Georgia of their property without due process of law, not only deprives them of their constitutional right, but violates the principles of equity in its shock to the conscience.

4.

As To The Alleged Laches

The contention that petitioner was late in making claim to the fund is wholly without merit. Claim was made long before even the interlocutory judgment of October 20, 1967 (App. B, p. 6a) and was referred to in the order of the trial court from which the appeal relating thereto was taken (App. G, pp. 16a-17a). The Ancillary Receiver, in a petition to the trial court, stated that the Domiciliary Receiver had made a written demand upon him for such deposit by letter dated December 23, 1966, that the bar date for filing claims had passed and no workmen's compensation claims had been filed; and that he was in doubt as to the disposition of the special deposit and needed direction from the court (App. E, pp. 11a-12a).

In response thereto the petitioner reiterated his right to such deposits and prayed "for an order directing said Ancillary Receiver to forthwith transfer to the Domiciliary Receiver the Special Deposits of $50,000 and $10,000 respectively * * *" (App. F, pp. 13a-15a).

The order of the trial court made May 23, 1967 respecting such petition and response, expressly made reference to the demand by the Domiciliary Receiver (petitioner herein) and his "opposition to the Ancillary Receiver's retaining the $50,000 Workmen's Compensation deposit" (App. G, pp. 16a-17a).

The demand was reiterated (App. L, pp. 28a-33a), when the trial Court expressly gave petitioner, the Domiciliary Receiver, an opportunity to file objections before permitting a disbursement of the funds (App. K, p. 27a).

The Georgia Supreme Court was, therefore, clearly in error when it stated that the Domiciliary Receiver had been silent and waived his objection. The error is apparent in the very judgment of the court itself where it noted that "the Domiciliary Receiver had demanded that they (the deposits) be delivered to him for administration in Michigan." (App. A, p. 1a). This Court is not bound by the conclusion of the Georgia Court as to facts which the record plainly shows did not exist or in respect to which it was completely mistaken (*Truax* v. *Corrigan,* 257 U.S. 312, 324, *Ker* v. *California,* 374 U.S. 23, 33-34).

In like vein the Georgia Court's ruling that its holding in its interlocutory judgment of October 20, 1967 and particularly its disregard of the judicial admission that Michigan was a reciprocal state and entitled to the benefit of the Georgia Uniform Insurers Liquidation Act (App. A. p. 2a) established the law of the case (App. A. p. 3a), cannot bar this Court from examining and passing upon it. Such ruling and its repetition in the judgment sought to be reviewed, merely underscored the denial of the full faith and credit to which the Michigan statute was entitled by such a judicial admission. The only time this Court could review it was when the proceeding was terminated with a final judgment (*Georgia R. & Power Co.* v. *Decatur, supra,* p. 437).

Moreover, the contention is specious. Claimants do not even suggest, much less show, that the lapse of time resulted in any injury, prejudice or disadvantage to claimants or anyone else, and indeed it is apparent there was was none. Such lapse, even if it existed, may not be raised to defeat justice in the absence of such injury, prejudice or disadvantage (*Shell* v. *Strong* [CA 10], 151 F. [2d] 909, 911, *Hoehn* v. *Crews* [CA 10], 144 F. [2d] 665, 671, cert. denied, *In re Stilwell* [CA 2], 120 F. [2d] 194, 195, *Sabole* v. *U. S. Steel Corp.* [CA 3], 359 F. [2d] 7, 12-13, *Crews* v. *Crews,* 162 S.E. 107, 174 Ga. 45).

5.

As To The Authorities Cited By Claimant

None of the statutes cited by claimants (and neither quoted nor set forth in an appendix) are pertinent. Only a few of the authorities cited are relevant, and, rather than support, they completely destroy claimants' argument.

For example, *Van Schaick* v. *Brown,* 131 Ohio St. 310, 2 N.E. (2d) 827, held that a special deposit for a particular class of policyholders is a trust fund and it was the duty of the Ohio Superintendent of Insurance to release it to the Domiciliary Receiver of an insurance company in liquidation when claims of that particular class were satisfied.

So also *Lloyds* v. *State of Ohio,* 98 S.W. (2d) 259, wherein it was held that a special deposit made for the benefit of creditors holding surety, guaranty or fidelity obligations of the insolvent insurance company, was to be distributed to all such creditors of the insolvent company wherever arising, and reversed the court below which gave priority to Texas claims.

The further lack of substance in claimants' brief is illustrated in their quotation at page 7 of their brief of what purports to be an excerpt from the opinion of this Court in *Fischer* v. *American Life Insurance Company,* 314 U.S. 549.

It is not what it pretends to be. It is an extract from the headnote, is taken out of context, and hasn't the slightest analogy to the case at bar. The question presented was whether the United States District Court in Iowa had jurisdiction to determine a dispute between the Iowa receiver of American Life Insurance Company on the one hand and the Michigan and Texas receivers on the other, as to the rights of the Iowa receiver to assets of the company in his possession deposited for the protection of a *special class of policyholders.* It was held the District Court had such jurisdiction.

The claimants' reference to a construction of the Georgia statutes is sterile. There was none, and if it could be said there was, it stemmed from the refusal of the Georgia Supreme Court to give full faith and credit to the Michigan statute as it was required to do by the judicial admission as discussed in petitioner's Main Brief; and, thereafter, compounding its error, by approving the trial court's refusal to permit petitioner to prove the statute after it had itself inferentially suggested it. A construction of the Georgia statute flowing from a denial of petitioner's constitutional right, it is respectfully submitted, would be clearly invalid.

CONCLUSION

For the reasons set forth in petitioner's brief and in this Repy Brief, the petition for a Writ of Certiorari to the Supreme Court of Georgia should be granted.

Respectfully submitted,

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